United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-1728

To be argued by
GEORGE H. WELLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1728

ROBERT SHERIDAN,

Plaintiff,

—against—

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, INC.,

Defendants, Third Party Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
GEORGE H. WELLER,
Assistant United States Attorneys,
Of Counsel.

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

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BRIEF FOR THE APPELLEE

Preliminary Statement

On March 29, 1974, the United States District Court for the Eastern District of New York (Travia, *J.*), by Decision and Order, dismissed the third party action against the United States, employer of the plaintiff.

The injured plaintiff was a government employee on government business who, on December 27, 1971, was riding on the passenger side of a government vehicle driven by another government employee when the vehicle was involved in an accident with a truck.

The defendants-third party plaintiffs are the driver of the truck, the owner of the truck, and the corporaiton whose product was being carried in the truck.

The United States has already paid its injured employee over $22,500 under the Federal Employees' Compensation Act.

The Court dismissed the third party complaint and held that the exclusivity section of the Federal Employees' Compensation Act revokes the consent of the United States to be sued by third party plaintiff for contribution under the Federal Tort Claims Act.

The Court also held that there is no basis for indemnity because the third party defendant United States had no independent duty or relationship to the third party plaintiffs.

On April 26, 1974, the Clerk of the District Court issued a final judgment pursuant to the Court's April 24, 1974 certificate under Rule 54(b) of the Federal Rules of Civil Procedure.

From this final judgment, defendants-third party plaintiffs have taken this appeal.

Statement of Facts

Robert Sheridan, a U.S. Food and Drug Administration GS-7 Management Intern, was injured [1] when the General

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[1] In an affidavit filed with the District Court on February 5, 1974 as an exhibit to the Government's memorandum of law accompanying its motion to dismiss, the Director of the Office of Federal Employees' Compensation stated that:

$10,682.47 had been paid for medical expenses as of April 14, 1972;

[Footnote continued on following page]

Services Administration vehicle in which he was riding on the passenger side was involved in an accident with a truck at the Van Dam exit of the Long Island Expressway at about 10:30 A.M. on December 27, 1971. Sheridan was accompanying a GS-11 Senior Inspector of the Food and Drug Administration who was driving from inspection point to inspection point.

By complaint dated July 11, 1972, the injured Robert Sheridan brought a tort action in the Supreme Court, County of Kings, against Gaspare DiGiorgio, the driver of the truck, LPI Transport Corp., the owner of the truck, and Pepsi-Cola, Inc., whose syrup the truck was carrying. The defendants' answer was dated July 19, 1972.

In a third party complaint dated September 21, 1972, defendants DiGiorgio, LPI Transport Corp., and Pepsi-Cola impleaded the GS-11 Senior Inspector and Robert Sheridan (16a), alleging in part:

> "That the contact between said vehicles was caused solely by the negligence of the third party defendants . . ." (3rd party compl. TWELFTH) (17a);
>
> "said damages were sustained by reason of the sole . . . negligence . . . by the plaintiff and third-party defendants . . ." (3rd party compl. FIFTEENTH) (18a); and
>
> "if any judgment is recovered . . . by the plaintiff against . . . defendants they will be damaged thereby

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$2,743.54 in compensation for temporary total and temporary partial disability had been paid as of April 14, 1972;

$9,764.30 in compensation for permanent partial disability had been paid for the period Feb. 23, 1973 to Jan. 30, 1974, for 11% permanent loss of the use of the right arm and 5% permanent loss of use of the right leg; and further determinations and compensation continued.

and the plaintiff and third-party defendants will be primarily liable therefore" (3rd party compl. FIFTEENTH) (18a); with the prayer demanding

"that . . . defendants have judgment over and against the plaintiff and/or third-party defendants for the amount of any verdict or judgment, or portion thereof . . ." (3rd party compl. WHEREFORE) (18a).

By October 10, 1973 the entire case had been removed to the United States District Court, Eastern District of New York, and the United States had been substituted for the GS-11 Senior Inspector as a third party defendant (52a-54a).

In response to a motion initiated by the United States on January 18, 1974, the District Court ordered Robert Sheridan dismissed as a third party defendant and gave the United States leave to serve and file an amended answer in place of its original answer (65a-1-65a-2) (55a and 56a).

The United States served and filed its amended answer on January 28, 1974, stating as its Third Defense:

"The third-party complaint fails to state a complaint upon which relief can be granted as the exclusive liability of the United States of America is under the Federal Employees Compensation Act, 5 U.S.C. § 8116(c)" (66a-67a).

By Notice of Motion dated February 1, 1974, third party plaintiffs moved to dismiss this third defense (68a-69a). On February 5, 1974 the United States applied under Rule 12(d) Federal Rules of Civil Procedure for the Court to hear and determine its Third Defense (72a-73a).

In a March 26, 1974 Decision and Order, the Court dismissed the third-party action (74a-83a), and on April 24, 1974 issued a Rule 54(b) certificate directing that a final judgment be entered (87a). The Clerk issued the final

judgment on April 26, 1974 (88a), and this appeal was taken by third party plaintiffs (89a-90a).

In its Decision and Order, the District Court held that

> "the Government's immunity from suit under FECA is Federally created and the dimensions of that exemption must be measured by federal rather than state standards" (App. 77a);

and that

> "the exclusivity section of FECA . . . revoke[s] the consent of the United States to be sued for contribution . . . under the Federal Tort Claims Act" (76a, 77a-81a);

and also that as

> "the nexus existing between the third-party plaintiffs and the Government here arises solely from the circumstances of the accident itself. There are no other connections between the parties which might provide the necessary linkage to establish an independent duty or relationship,"

and therefore there is no indemnity (81a-82a).

ARGUMENT

POINT I

The liability of the United States to third persons under the Federal Employees' Compensation Act is to be resolved as a matter of Federal law.

Appellants argue that the Federal Tort Claims Act requires that the extent of the immunity of the United States be resolved by the law of the State of New York, the law of the place where the accident occurred. (Appellants' brief, pages 8-10, 14 & 15.)

Since the Federal Employees' Compensation Act is a federally created immunity provision, 5 U.S.C. 8116(c), the extent of the immunity must be resolved as a matter of federal law by the federal courts. *Travelers Insurance Co.* v. *United States,* 493 F.2d 881, 883 (3d Cir. 1974); *Newport Air Park, Inc.* v. *United States,* 419 F.2d 342, 347 (1st Cir. 1969). *See, also,* Jayson, HANDLING FEDERAL TORT CLAIMS 164 (1972).

Whenever the federal courts have been faced with the question as to whether a particular federal Act makes the United States immune from suit, the question has been resolved as a matter of federal law, following the direction of the Supreme Court that

> "[I]t is the duty of this Court to attempt to fit the . . . Act as intelligently and fairly as possible into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole." *Feres* v. *United States,* 340 U.S. 135, 139 (1950); and *Johansen* v. *United States,* 342 U.S. 427, 432 (1952).

See, also, Patterson v. *United States,* 359 U.S. 495 (1959); *Noga* v. *United States,* 411 F.2d 943 (9th Cir. 1969), *cert. denied,* 396 U.S. 841 (1969); *Granade* v. *United States,* 356 F.2d 837 (2d Cir. 1969), *cert. denied,* 385 U.S. 1012 (1967); and 84 A.L.R.2d 1059 (1962).

POINT II

The exclusivity provision of the Federal Employees' Compensation Act (5 U.S.C. §8116(c)) prohibits a third party action in this case against the United States for contribution or indemnity.

(1)

The courts have consistently held that the United States cannot be sued directly by a government employee for his personal injuries. *Granade* v. *United States*, 356 F.2d 837 (2d Cir. 1969), *cert. denied*, 385 U.S. 1012 (1967); *Noga* v. *United States*, 411 F.2d 943 (9th Cir. 1969), *cert. denied*, 396 U.S. 841 (1969); *Leahy* v. *United States*, 160 F. Supp. 519 (E.D.N.Y. 1958); and *DeVos* v. *United States*, 121 F. Supp. 514 (E.D.N.Y. 1954).

In *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 557 (1951), the Supreme Court held that the Federal Tort Claims Act "carries the Government's consent to be sued . . . as a third party defendant."

The question is, therefore, whether the exclusivity section of the Federal Employees' Compensation Act revokes the consent of the Government in the Federal Tort Claims Act to be sued as a third party defendant.

(2)

The intent of Congress to make the United States immune from a third party action through the use of the exclusivity section of the Federal Employees' Compensation Act is demonstrated by the legislative history of the Act. The original bill (H.R. 3191) amending the Federal Employees' Compensation Act was changed in the Senate from legislation concerning

> "the remedy afforded to any person"

to legislation concerning

> "the liability of the United States."

Bill as reported to Senate, H.R. 3191, 95 Cong. Rec. 13606 (Sept. 30, 1949).	Act: Sec. 201 of Federal Employees' Compensation Act Amendments of 1949, 63 Stat. 854 at 861.
The remedy afforded to any person	
	The liability of the United States
	. . .
under this Act with respect to	under this Act . . . with respect to
his own	
	the
injury	injury . . .
	of an employee
shall be	shall be
the	
exclusive	exclusive
remedy against	
and	and
be	
in place of	in place of
any	
	all
other	other
legal	
liability	liability
	to the employee,
	his legal representative,
	spouse,
	dependents,
	next of kin, and
	anyone otherwise entitled
	to recover damages from

of	
the United States . . .	the United States . . .
on account of such injury	on account of such injury . . .
where such liability	
is determined by	
	in any
direct judicial proceedings	direct judicial proceedings
in a civil action . . .	in a civil action . . .
or by proceedings . . .	or by proceedings . . .
under any Federal tort	under any Federal tort
liability statute . . .	liability statute . . .

The bill as modified in the Senate emphasized the liability of the United States towards anyone. Liability with respect to the injury of a government employee was made "exclusive and in place of all liability of the United States to . . . anyone . . . entitled to recover damages from the United States on account of such injury."[2]

Other legislative history shows a desire by Congress to make the remedy under the Federal Employees' Compensation Act the exclusive remedy. S. Rept. No. 836, 81st Cong., 1st Sess. (1949), 1949 *U.S. Code Congressional and Administrative News* 2125; H.R. Rept. No. 729, 81st Cong., 1st Sess. 5, 15 (1949); Testimony by Oscar Ewing, Federal Security Agency Administrator in Hearings Before

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[2] In *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 601 (1963), the Supreme Court said of the exclusivity section of the Federal Employees' Compensation Act:

> "The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties. . ."

The language of *Weyerhaeuser* is difficult to reconcile with the legislative history of the exclusivity section of the 1949 amendments to the Federal Employee's Compensation Act. 95 Cong. Rec. 13606 (Sept. 30, 1949).

the Subcommittee of the Senate Committee on Labor and Public Welfare 9, 53-54 (June 13, 1949); Testimony by J. Donald Kingsley, Acting Administrator, Federal Security Agency, in Hearings Before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 81st Cong., 1st Sess. on H.R. 3191, 25 (April 11, 1949).

The legislative history also demonstrates that the purpose of the exclusivity provision of the Federal Employees' Compensation Act is to create savings to the United States both in damages recovered and in the expense of handling lawsuits; that is, to replace needless and expensive litigation with measured justice. S. Rept. No. 836, 81st Cong., 1st Sess. (1949), 1949 *U.S. Code Congressional and Administrative News* 2135; Testimony by Oscar Ewing, Federal Security Agency Administrator in Hearings Before the Subcommittee of the Senate Committee on Labor and Public Welfare, 54 (June 13, 1949); *See also,* H.R. Rept. No. 729, 81st Cong., 1st Sess. 54 (1949).

(3)

The exclusivity section of the Federal Employees' Compensation Act was worded the same as the exclusivity sections of the Longshoremen's and Harbor Workers' Act and the New York Workmen's Compensation Law. (Testimony by J. Donald Kingsley, Acting Administrator, Federal Security Agency, in Hearings Before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 81st Cong., 1st Sess., on H.R. 3191, p. 25 (Apr. 11, 1949).)

In 1949 these statutes read as follows:

FECA of 1949 § 201 63 Stat. 861 [3]	LHWA § 5 44 Stat. 1426 [4]	N.Y. WORK. COMP. L. § 11
The liability of the United States . . .	The liability of an employer . . .	The liability of an employer
shall be exclusive, and in place, of all	shall be exclusive, and in place, of all	shall be exclusive, and in place, of
other liability . . .	other liability . . .	any other liability whatsoever,
to the	to the	to
employee . . .	employee . . .	such employee . . .
and anyone otherwise entitled to recover damages from	and anyone otherwise entitled to recover damages from such employer	or anyone otherwise entitled to recover damages
	at law or in admiralty	at common law or otherwise
the United States on account of such injury . . . in any direct judicial proceedings in a civil action or in admiralty, or by proceedings . . . under any Federal tort liability statute . . .	on account of such injury . . .	on account of such injury

[Footnotes begun on following page]

The cases interpreting these statutes barred an action for contribution. They also barred an action for indemnity unless the United States owed an independent duty to the third party.[5] *See Burris* v. *American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941); *Frusteri* v. *United States*, 76 F. Supp. 667 (E.D.N.Y. 1947); *Calvino* v. *Pan Atlantic S.S. Corp.*, 29 F. Supp. 1022 (S.D.N.Y. 1939); *Alloco* v. *Gulf Oil Corp.*, 59 N.Y.S.2d 51 (Sup. Ct. Monroe Cty., 1945); *Barbara* v. *Stephen Ransom Inc.*, 191 M. 957, 79 N.Y.S.2d 438 (Spec. Term Kings Cty., 1948); *Gorham* v. *Aroms*, 76 N.Y.S.2d 850 (Spec. Term N.Y. Cty., 1947).

Each of these cases, federal and State, cited the case of *Westchester Lighting Co.* v. *Westchester C.S.E. Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938). In *Westchester*, an employer broke a gas company's gas line and then negligently patched it, permitting gas to escape and asphyxiate his employee. The employee's administratrix successfully sued the gas company for not making timely discovery that gas was escaping. The gas company then sued the employer demanding indemnity.

The employer raised the defense that he could not be sued by the gas company because he had provided work-

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[3] Wording of this Act was modified slightly from that shown here when it was enacted into positive law. 80 Stat. 542 (1966), 5 U.S.C. § 8116(c).

[4] This section became 33 U.S.C. § 905(a) in 1972, with amendments added as 33 U.S.C. § 905(b). § 18(a), P.L. 92-576, 86 Stat. 1263.

[5] In indemnity full reimbursement is sought, and the word implies a relationship between parties involving a contract or a separate obligation running from the employer to the third party. Larson, WORKMENS COMPENSATION, THIRD PARTY'S ACTION OVER AGAINST EMPLOYER, 65 N.W.U.L. Rev. 351, 419 (1970).

In contribution, ratable or proportional reimbursement is sought "on account of" the injury. Larson at 419.

men's compensation which had been paid to the employee, and § 11 of the New York Workmen's Compensation Law made this payment the exclusive liability of the employer. The employer argued that the gas company was trying to collect damages from the employer "on account of" the employee's injury.

The New York Court of Appeals said that the gas company was not suing for damages "on account of" the employee's death, but was asserting the gas company's own right of recovery for breach of an independent duty or obligation owed by the employer to the third party (the gas company). (The independent duty of the employer to the gas company was the duty to properly seal the gas pipe after the employer fractured it, and thus prevent the escape of gas.)

It is this concept, independent duty by employer to third party, which ran through the cases in effect at the time the exclusivity section of the Federal Employees' Compensation Act was being enacted. It is well settled that if there is no independent duty of the employer to the third party, then there is no recovery.[6]

This lack of any averment or showing or possibility of independent duty by the third party defendant employer United States to the third party plaintiff, in part caused the District Court (Travia, *J.*) to dismiss the third party action:

> "[T]he nexus existing between the third-party plaintiffs and the Government here arises solely from the

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[6] Indemnity is also available when there is a contractual relationship, express or implied, between the third party plaintiff and the third party defendant. *See*, Larson, WORKMEN'S COMPENSATION: THIRD PARTY'S ACTION OVER AGAINST EMPLOYER, 65 N.W.U.L. Rev. 351 (1970). There is no hint that the third party plaintiff claims in this automobile tort action that there was or could have been a contractual relationship.

circumstances of the accident itself . . . [t]here are no other connections between the parties which might provide the necessary linkage to establish an independent duty or relationship" (81a-82a).

(4)

Fourteen years elapsed before the Supreme Court first interpreted the exclusivity section of the Federal Employees' Compensation Act.

During this period the New York federal and state courts held that the exclusivity section of the Longshoremen's and Harbor Workers' Act and the New York Workmen's Compensation Law immunized an employer from any liability "on account of" an employee's injury. The courts held that any liability of an employer to a third person in a third party action could only be based on the breach of an independent duty to the third person.[7]

Preparing the way for a Supreme Court interpretation

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[7] *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956); *Halycon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); *LoBue* v. *United States et al*, 188 F.2d 800 (2d Cir. 1951); *Slattery* v. *Marra Bros.*, 186 F.2d 134 (2d Cir. 1951), *cert. denied*, 341 U.S. 915 (1951); *American Mutual Liability Insurance Co.* v. *Matthews et al*, 182 F.2d 322 (2d Cir. 1950); *Rich* v. *United States*, 177 F.2d 688 (2d Cir. 1949); *McFall* v. *Compagnie Marttime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952); *Edwards* v. *Sophkirsh Holding Corp.*, 280 A.D. 168, 112 N.Y.S.2d 219 (1st Dept. 1952), *aff'd* 304 N.Y. 850, 109 N.E.2d 717 (1952); *Tabor* v. *Stewart*, 277 A.D. 1075, 100 N.S.2d 697 (3rd Dept. 1950); *Wright* v. *Lichtman*, 36 F.2d 1096, 234 N.Y.S.2d 39 (Spec. Term, Queens Cty., 1962); *Tuffarello* v. *Erie R. R. Co.*, 33 M.2d 1040, 266 N.Y.S.2d 87 (Spec. Term, Nassau Cty., 1962), *aff'd* 17 A.D.2d 484, 236 N.Y.S.2d 503 (1962), *aff'd*, 13 N.Y.2d 1045, 245 N.Y.S.2d 769, 195 N.E.2d 454 (1963); *Tuffarello* v. *Erie R. R. Co.*, 27 M.2d 638, 211 N.Y.S.2d 351 (Spec. Term, Nassau Cty., 1961); and *Cardinal* v. *State of New York*, 200 M. 574, 102 N.Y.S.2d 895 (Ct. Cl. 1951).

of the Federal Employees' Compensation Act's exclusivity section was the Third Circuit opinion in *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962). In a diversity case from a United States District Court in Pennsylvania involving the explosion of a steel tank negligently fabricated by Treadwell and resultant injury to a government employee, Treadwell impleaded the United States, claiming contribution or indemnity for over $10,000. The Third Circuit held that if the action was a tort claim against the United States, a joint tortfeasor, the Federal Employees' Compensation Act's exclusivity section barred the proceeding.

Cited as authority for this conclusion was an earlier Ninth Circuit opinion in *United States* v. *Weyerhaeuser S.S. Company*, 294 F.2d 179 (9th Cir. 1961). The *Weyerhaeuser* and *Treadwell* cases reached the Supreme Court at about the same time.

Weyerhaeuser was decided first in *Weyerhaeuser S.S. Company* v. *United States*, 272 U.S. 597 (1963). This was a maritime collision case in which a government employee on an Army dredge was injured in a collision between the dredge and Weyerhaeuser's vessel. The collision occurred as a result of the mutual fault of both vessels.

Relying on their language in *The Chattahoochee*, 173 U.S. 540, 603 (1899), where they held that

> "the full scope of the divided damages rule must prevail over a statutory provision which . . . limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision",

the Supreme Court held that the scope of the divided damages rule in mutual fault collisions is unaffected by the

Federal Employees' Compensation Act's exclusivity provision. The Court went further. As to the Federal Employees' Compensation Act's exclusivity provision, the Court said:

> "There is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admirality law affecting the mutual rights and liabilities of private ship-owners in collision cases" p. 601.

Finally, the Court remanded the *Drake* v. *Treadwell Construction Company* case, *sub nom., Treadwell Construction Company* v. *United States,* 372 U.S. 722 (1963), "to the United States District Court for the Western District of Pennsylvania for further consideration in light of *Weyerhaeuser Steamship Co.* v. *United States.*"[8]

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[8] The United States District Court for the Western District of Pennsylvania on remand did allow contribution by the United States. *Murray* v. *United States,* 405 F.2d 3161, 1364 n. 12 (D.C. Cir. 1968); *Hart* v. *Simons,* 223 F. Supp. 109, 111 n. 1 (E.D. Pa. 1963). No later court opinion makes mention of the possibility that the District Court on remand ordered payment by the United States to Treadwell on the basis that the United States owed an independent duty to Treadwell to use its tank in a non-negligent manner.

In most jurisdictions, contribution requires joint liability to the injured employee. If the employer's liability to the employee is destroyed by the exclusivity provision of Workmen's Compensation statutes then there cannot be contribution. Pennsylvania has a different rule, and stands alone with its rule that contribution between joint tortfeasors depends upon joint negligence rather than joint liability. *Elston* v. *Industrial Lift Truck Co.,* 240 Pa. 97, 102 n. 2, 216 A.2d 318, 320 n. 22 (1970).

Most recently, however, in *Cooper Stevedoring Co., Inc.* v. *Kopke*, —— U.S. —— (1974), 94 S. Ct. 2174, the Supreme Court apparently rejected its language in *Weyerhaeuser*. *Cooper* involved the exclusivity section of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 905(a), a section close in wording to the exclusivity section of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c). The Supreme Court pointed out that there was a well established maritime rule allowing contribution between joint tort feasors, but in *dicta* explained that in an action in which the third party defendant is the employer of the plaintiff, the exclusivity section of Longshoremen's and the Harbor Workers' Act bars contribution by the employer to the third party plaintiff.[9]

(5)

The preceding argument has analyzed the effect of the exclusivity section of the Federal Employee's Compensation Act and similar statutes on the issue of the liability of an employer to a third party. It is the position of the Government that the United States can only be liable where there is an express or implied contract, or an independent duty by the United States to a third party plaintiff. As none is present in this case, there exists no basis for this third party action.

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[9] Two cases involving the liability of an employer to a third party have previously been decided in this Circuit. In *Schwartz* v. *Compagnie General Transatlantique*, 405 F.2d 270 (2d Cir. 1968), a case involving an immigration inspector injured on a ship in New York, this Court held that there could be no recovery against the United States.

And in *Kantlehner* v. *United States*, 279 F. Supp. 122 (E.D. N.Y. 1967) the District Court applied § 11 of the New York Workmen's Compensation Law, the law on which 5 U.S.C. 8116(c) is based, to an aircraft accident. Stating that an employer is not a "joint tortfeasor", the court held that payment under the Workmen's Compensation Law constituted a complete defense to a third party claims for contribution.

The language of the Supreme Court in *Weyerhaeuser* and its action in *Treadwell* have been rejected by all federal courts but one. They have handled the question of liability in different ways, using in a contradictory manner such labels as "contribution," "indemnity", and "independent duty." Consequently, the Third Circuit has characterized the state of the law as in "hopeless conflict." *Travelers Insurance Company* v. *United States,* 493 F.2d 881 (3d Cir. 1974).

With the exception of the Fourth Circuit, the Courts agree that there is no contribution by the employer United States to a third party when there is a liability for payment of benefits to a federal employee. The conflict in the cases arises only as to the liability of the United States for *indemnity.*

Cases holding that there is no contribution are: *Newport Air Park* v. *United States,* 419 F.2d 342 (1st Cir. 1969); *Maddox* v. *Cox,* 382 F.2d 119 (8th Cir. 1967) (armed forces personnel under *Feres* doctrine); and *Busey* v. *Washington,* 225 F. Supp. 416 (D.D.C. 1964).

Cases holding that there is no contribution or tort indemnity are: *Travelers Insurance Co.* v. *United States, Wien Alaska Airlines* v. *United States* 375 F.2d 736 (9th Cir. 1967), *cert. denied,* 389 U.S. 940 (1967); *United Airlines* v. *Weiner,* 335 F.2d 379 (9th Cir. 1964), *cert. dismissed sub nom., United Airlines* v. *United States,* 379 U.S. 951 (1964); *Keisel* v. *Buckeye Donkey Ball, Inc.* v. *United States,* 311 F. Supp. 370 (E.D. Va. 1970) (armed forces personnel and *Feres* doctrine); *Scarbrough* v. *Morrow Transfer Co.,* 277 F. Supp. 92 (E.D. Tenn. 1967); and *Drumboole* v. *Virginia Electric & Power Company* v. *United States,* 170 F. Supp. 824 (E.D. Va. 1959) (armed forces personnel and *Feres* doctrine).

Cases which indicate that indemnity may be allowed are: *Wellington Transportation Co.* v. *United States,* 481 F.2d

10 (6th Cir. 1973) (armed forces personnel & *Feres* doctrine); and *Murray* v. *United States*, 405 F.2d 130 (D.C. Cir. 1968).

The Fourth Circuit is the exception. In *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970), a U.S. Department of Agriculture inspector fell off the accommodation ladder of a ship in Virginia. The court discussion stated that indemnity had been allowed in at least three situations:

1. When there is a contractual duty of an employer to a third party. *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956).
2. When a rule of law governs the relationship between an employer and a third party. *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963).
3. When there are other types of obligations. *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963).

The Court in *Wallenius* found from *Weyerhaeuser's* language and the rule of *ejusdem generis*, that the exclusivity section of the Federal Employees' Compensation Act applied only to those connected to and closely related to the government employee because they benefit from the remedy of workmen's compensation, but third party tortfeasors do not. The Court then stated that

> "the better rule is that which rests the right of indemnity upon violation of a duty of care to the injured person rather than upon tort 'liability'." 409 F.2d at 998.

Thus, the Fourth Circuit seems to adopt the Pensylvania concept of joint negligence (duty) rather than joint liability. When the Fourth Circuit speaks of indemnity in this context it seems to be speaking of what the other courts call contribution.

Adoption by the Fourth Circuit of the concept of "duty of care" conflicts with the legislative history of the exclusivity section of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c). The discussion by the Supreme Court in *Cooper Stevedoring Co. Inc.* v. *Kopke*, — U.S. — (1974), 49 S.Ct. 2174, speaks in terms of the employer's liability and the limitations on this liability provided by the law. The Court does not speak or hint of a standard of duty to the employee. *See also*, H.R. Rept. No. 92-1441, 92nd Cong., 2d Sess. (1972), 1972 *United States Code Congressional and Administrative News* 4698-4720, concerning the 1972 amendments to the Longshoremen's and Harbor Workers' Act.

(6)

Appellants argue that N.Y. Veh. & Traffic L. § 388 (McKinney's 1970) [10] and *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143, 281 N.Y.S.2d 382, 282 N.E.2d 288 (1972), impose the liability of a driver on the owner of a vehicle and create an independent duty on the part of the owner-employer United States to the third party plaintiffs.

In fact, under New York state law, the statute making the owner liable for injuries resulting from the driver's negligence in operation of the vehicle does not establish an independent duty to a third party. Under N.Y. Work. Comp. L. § 29(6) (McKinney's 1973-1974 Supp.),[11] any action is barred which is dependent upon the same claim

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[10] "1. Every owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries . . . resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. . . ."

[11] The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured . . . by the negligence or wrong of another in the same employ."

of negligence for which the Workmen's Compensation Law has provided an exclusive remedy. *See, Rauch* v. *Jones*, 4 N.Y.2d 592, 176 N.Y.S.2d 628, 152 N.E.2d 63 (1958).

In *Dole* the exclusivity provision of N.Y. Work. Comp. L. § 11 (McKinney's 1965) was preserved and only if the third party defendant owed an independent duty to the defendant-third party plaintiff would a third party action be proper in a case involving N.Y. Work. Comp. L. § 11. The Court in *Dole* at 30 N.Y.2d 152 was careful to point out that the defendant's third party action was "based on a separable legal entity of rights to be adjudicated from the action by the . . . [plaintiff] against it." [12]

(7)

Appellants argue that it is unfair to them to permit the United States to be dismissed as third party defendants. (Appellants' brief pp. 14-20.) The thrust of the argument is that the United States will realize a return from its "workmen's compensation" and the government employee plaintiff will get a double recovery, civilly and through "workmen's compensation."

Third party plaintiffs have no basis for a third party action for indemnification, as has been shown, because the United States did not owe them any independent duty. If they are free from fault they cannot be held liable and there could not be any occasion to assert an indemnity claim.[13]

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[12] The Judicial Conference fails to mention this independent duty by the third party defendant to the third party plaintiff when discussing *Dole* and contribution. 1974 McKinney's Session Laws of New York A-3 at A-23 (Pamph No. 1, Mar. 10, 1974).

[13] *Panico* v. *Whiting Milk Co.*, 335 F. Supp. 315 (D. Mass. 1971) puts it best. In an automobile case, if the third party

[Footnote continued on following page]

If third party plaintiffs are found by the Court to be negligent and the plaintiff recovers from them, the plaintiff government employee is required by 5 U.S.C. § 8132 to return to the United States all he received minus reasonable attorney's fees and costs of suit. The plaintiff does not enjoy a double recovery.

The fact that the Government could stand to recover almost all of its payment is obvious from the face of the legislation. Appellant's challenge to this provision of the statute cannot be directed to this Court.[14]

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

July 23, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
GEORGE H. WELLER,
Assistant United States Attorneys,
Of Counsel.

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is free from fault the third party cannot be held liable and there will not be any occasion to assert an indemnity claim.

If the third party is at fault (negligent) then there cannot be an indemnity claim as indemnity is available only to a party free of fault.

[14] The United States Attorney's Office wishes to acknowledge the invaluable assistance of Ms. Joan D. Mantel in the preparation of this brief. Ms. Mantel is a third year student at the New York University School of Law.

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Sheridan

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 26th day of July 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

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11 Park Place
New York, New York 10007

O'Leary & O'Leary, Esqs.
88-14 Sutphin Blvd.
Jamaica, New York 11435

Sworn to before me this
26th day of July 1974

Irene B. Cohen

IRENE B. COHEN
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

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PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

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United States Attorney,
Attorney for _____

To:

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SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

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United States Attorney,
Attorney for _____

To:

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_____

Attorney for _____

_____ Action No.___

UNITED STATES DISTRICT C
Eastern District of New Yo

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____is hereby admitted.

Dated: _____,

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Attorney for _____

FPI-LC-5M-6-73-7355